14 No. 47

IN THE

Supreme Court of the United States

UTILITY AIR REGULATORY GROUP,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

F. WILLIAM BROWNELL
(*Counsel of Record*)
HENRY V. NICKEL
LEE B. ZEUGIN
LAUREN E. FREEMAN
ELIZABETH L. HORNER
HUNTON & WILLIAMS LLP
2200 PENNSYLVANIA AVE., NW
WASHINGTON, D.C. 20037
(202) 955-1500
bbrownell@hunton.com

July 14, 2014 — *Counsel for Petitioner*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Emissions from electric utility steam generating units (EGUs) were extensively regulated before the Clean Air Act Amendments in 1990. Because these Amendments required substantial additional reductions in EGU emissions of conventional pollutants (*e.g.*, sulfur dioxide and particulate matter) that would also collaterally reduce emissions of hazardous air pollutants (HAPs), Congress in 42 U.S.C. § 7412(n)(1)(A) called for regulation of only those EGU HAP emissions found to pose a hazard to public health *after* implementation of the other required control programs. For any remaining HAP emissions posing a residual health risk, Congress authorized only "such regulation" as was "appropriate and necessary." The court below affirmed EPA's use of this "appropriate and necessary" standard to expand EGU regulation to HAP emissions that pose *no* health risk and, over Judge Kavanaugh's dissent, to exclude cost from any consideration in making regulatory decisions. The question presented is:

Whether, under a statutory directive to regulate residual public health risks from EGU HAP emissions only as "appropriate and necessary," the Administrator (i) may regulate EGU HAP emissions that pose no hazard to public health, and (ii) may (or must as a *Chevron* Step One matter) ignore costs in determining "appropriate" regulation because more narrowly drawn decisional standards in the same statute require (or preclude) the Administrator from considering costs.

PARTIES TO THE PROCEEDING

The following were parties to the proceedings in the U.S. Court of Appeals for the District of Columbia Circuit:

The Utility Air Regulatory Group, the petitioner on review, was a petitioner and a respondent-intervenor below.

The respondent herein, which was the respondent below, is the United States Environmental Protection Agency.

Additional petitioners below were White Stallion Energy Center, LLC; American Public Power Association; ARIPPA; Chase Power Development, LLC; Edgecombe Genco, LLC; FirstEnergy Generation Corporation; Gulf Coast Lignite Coalition; Institute for Liberty; Julander Energy Company; Kansas City Board of Public Utilities; Midwest Ozone Group; National Black Chamber of Commerce; National Mining Association; Oak Grove Management Company, LLC; Peabody Energy Corporation; Puerto Rico Electric Power Authority; Spruance Genco, LLC; State of Alabama; State of Alaska; State of Arizona; State of Arkansas, ex rel. Dustin McDaniel, Attorney General; State of Florida; State of Idaho; State of Indiana; State of Kansas; State of Michigan; State of Mississippi; State of Missouri; State of Nebraska; State of North Dakota; State of Ohio; State of Oklahoma; Commonwealth of Pennsylvania; State of South Carolina; State of Texas; Texas Commission on Environmental Quality; Texas Public Utility Commission; Railroad Commission of Texas; State of Utah; Commonwealth of Virginia; State of West Virginia; State of Wyoming; Terry E. Branstad, Governor of the State of Iowa on behalf of the People of Io-

wa; Jack Conway, Attorney General of Kentucky; Tri-State Generation and Transmission Association, Inc.; United Mine Workers of America; West Virginia Chamber of Commerce, Inc.; Georgia Association of Manufacturers, Inc.; Indiana Chamber of Commerce, Inc.; Indiana Coal Council, Inc.; Kentucky Chamber of Commerce, Inc.; Kentucky Coal Association, Inc.; North Carolina Chamber; Ohio Chamber of Commerce; Pennsylvania Coal Association; South Carolina Chamber of Commerce; The Virginia Chamber of Commerce; The Virginia Coal Association, Incorporated; West Virginia Coal Association, Inc.; Wisconsin Industrial Energy Group, Inc.; Wolverine Power Supply Cooperative, Inc.; Chesapeake Climate Action Network; Conservation Law Foundation; Environmental Integrity Project; and Sierra Club.

Respondent-intervenors below (with respect to certain petitions for review) were Commonwealth of Massachusetts; State of California; State of Connecticut; State of Delaware; State of Illinois; State of Iowa; State of Maine; State of Maryland; State of Minnesota; State of New Hampshire; State of New Mexico; State of New York; State of North Carolina; State of Oregon; State of Rhode Island; State of Vermont; City of Baltimore; City of Chicago; City of New York; District of Columbia; County of Erie, New York; Calpine Corporation; Chase Power Development, LLC; Exelon Corporation; National Grid Generation LLC; Public Service Enterprise Group, Inc.; Gulf Coast Lignite Coalition; Institute for Liberty; Lignite Energy Council; National Black Chamber of Commerce; National Mining Association; Oak Grove Management Company, LLC; Peabody Energy Corporation; Sunflower Electric Power Corporation; Tri-State Generation and Transmission Association, Inc.; Util-

ity Air Regulatory Group; White Stallion Energy Center, LLC; American Academy of Pediatrics; American Lung Association; American Nurses Association; American Public Health Association; Chesapeake Bay Foundation; Citizens for Pennsylvania's Future; Clean Air Council; Conservation Law Foundation; Environment America; Environmental Defense Fund; Izaak Walton League of America; National Association for the Advancement of Colored People; Natural Resources Council of Maine; Natural Resources Defense Council; Ohio Environmental Council; Physicians for Social Responsibility; Sierra Club; and Waterkeeper Alliance.

A respondent below (with respect to certain petitions for review) was Lisa Perez Jackson, Administrator, United States Environmental Protection Agency. Ms. Jackson ceased to hold the office of Administrator, United States Environmental Protection Agency, on February 15, 2013; that office is currently held by Gina McCarthy, Administrator, United States Environmental Protection Agency.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner Utility Air Regulatory Group (UARG) is a not-for-profit association of individual electric generating companies and national trade associations that participates on behalf of its members collectively in administrative proceedings under the Clean Air Act, and in litigation arising from those proceedings, that affect electric generators. UARG has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a 10% or greater ownership interest in UARG.

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PETITION FOR A WRIT OF CERTIORARI

The Utility Air Regulatory Group (UARG) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit dismissing its petition to review a rule of the United States Environmental Protection Agency (EPA) titled "National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units," 77 Fed. Reg. 9304 (Feb. 16, 2012) (the Final Rule); Petition Appendix (Pet. App.) 105a-476a.

OPINIONS BELOW

The majority opinion of the D.C. Circuit is reported at 748 F.3d 1222 (D.C. Cir. 2014) (per curiam), and reproduced at Pet. App. 3a-72a. The dissent of Judge Brett Kavanaugh is reproduced at Pet. App. 73a-104a. Relevant excerpts of the Final Rule are reproduced at Pet. App. 105a-476a.

JURISDICTION

The D.C. Circuit entered judgment denying (and, in the case of No. 12-1174, dismissing) the petitions for review on April 15, 2014. Pet. App. 1a-2a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Section 112(n)(1)(A) of the Clean Air Act (CAA), 42 U.S.C. § 7412(n)(1)(A), provides:

(n) Other provisions

(1) Electric utility steam generating units

(A) The Administrator shall perform a study of the hazards to public health reasonably anticipated to occur as a result of emissions by electric utility steam generating units of pollutants listed under subsection (b) of this section after imposition of the requirements of this chapter. The Administrator shall report the results of this study to the Congress within 3 years after November 15, 1990. The Administrator shall develop and describe in the Administrator's report to Congress alternative control strategies for emissions which may warrant regulation under this section. The Administrator shall regulate electric utility steam generating units under this section, if the Administrator finds such regulation is appropriate and necessary after considering the results of the study required by this subparagraph.

This provision and additional excerpts from CAA § 112, 42 U.S.C. § 7412, are reproduced at Pet. App. 477a-505a.

INTRODUCTION

Imagine a situation in which Congress has instructed a regulatory agency to consider adopting a legislative rule to address "hazards to public health" that might remain after the implementation of other emission reduction programs, while further instruct-

ing the agency to regulate those residual public health risks only as "appropriate and necessary." Further imagine that, in response to this congressional instruction, the agency adopts a rule that, by the agency's own analysis, will impose costs on society on the order of $9.6 billion per year while realizing public health benefits of some $4-6 million a year: a ratio of $1 of "benefit" for every $1,500 spent. Now imagine that, in justifying this outcome, the agency concludes that ignoring costs in making the "appropriate and necessary" judgment is consistent with congressional intent and relieves the Agency of any obligation to explain why spending $1,500 to realize each $1 of benefit is "appropriate" regulation. Finally, imagine that the Agency then reverses course and interprets "appropriate" to give it authority to base regulation not on the singular "hazards to public health" criterion specified by Congress but also on an "environmental effects" criterion of its own making.

Now, step through the Looking-Glass and further imagine that, on judicial review, the agency action is affirmed on the basis of the court's conclusion that, given the "open-ended," "ambiguous," and "inherently context-dependent" nature of the word "appropriate," the agency was permitted both to ignore costs and to expand regulation to cover emissions that pose no health risk. In other words, precisely because the decisional standard "appropriate" is so broad, the agency may ignore costs or presumably any other factor encompassed by that broad and "open-ended" grant of regulatory authority but may use that same "appropriate" language to override

statutory limits on the type of risks that may be regulated.

That situation is this case. In dissenting from the panel's decision on "cost," Judge Kavanaugh observed that the "consideration of cost is commonly understood to be a central component of ordinary regulatory analysis, particularly in the context of health, safety, and environmental regulation." Pet. App. 78a. The panel majority disagreed, holding that because other provisions in 42 U.S.C. § 7412 expressly require EPA to take costs into consideration, EPA is permitted (if not required) to remove costs from the decisional equation in determining "appropriate" regulation of hazardous air pollutant (HAP) emissions from electric utility steam generating units (EGUs). If, as Judge Kavanaugh reasoned, the cost of compliance is normally a relevant factor in "ordinary regulatory analysis," the panel majority's decision leaves one to ponder how EPA's interpretation of 42 U.S.C. § 7412(n)(1)(A) to exclude costs entirely from consideration could possibly be "based on a permissible construction of the statute." Cf. *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

Can a statutory standard that is "broad and all-encompassing," Pet. App. 88a, be construed to exclude a factor normally relevant under that "all-encompassing" standard (in this case, "costs"), solely on the ground that the statute in other provisions contains narrower decisional standards that either expressly require (or expressly preclude) considera-

tion of that same factor? And if consideration of costs is at least permissible under such a broad statutory standard (as even EPA appears to concede), does an agency's fundamental obligation to engage in reasoned decisionmaking *require* consideration of that factor? Treating a broad and all-encompassing statutory standard as a delegation of authority to select or to ignore decisional criteria as needed to produce a desired result would give agencies unlimited discretion to create their own decisional standards, as EPA has done here.

In this case, EPA's decision to ignore entirely the costs of its decision has led to one of the most far-reaching and costly rules – if not *the* most costly rule – ever imposed under the CAA. Many regulatory statutes besides the CAA also contain similar decisional standards that, by their breadth, compel consideration of every factor affecting the potential costs and benefits of a particular type of regulatory action (here "public health hazards"). Regulatory agencies cannot be allowed to create their own decisional standards, picking and choosing relevant factors, while at the same time expanding the scope of the regulatory subject matter, whenever Congress calls upon them to regulate a specific subject only as "appropriate," or in the "public interest," or where "reasonable."

STATEMENT OF THE CASE

1. Section 112 of the CAA, as enacted in 1970, Pub. L. No. 91-604, 84 Stat. 1676, 1685 (1970), required EPA to determine whether sources within an

industrial category released any HAP in amounts that were reasonably anticipated to result in "an increase in mortality or an increase in serious ... illness," and to regulate those HAPs as necessary to protect public health with an "ample margin of safety." 42 U.S.C. § 1857c-7(a)(1), (b)(1)(B) (1970). Under this provision, EPA regulated HAPs emitted from source categories other than EGUs. See 40 C.F.R. Part 61.

2. Prior to 1990, in each case where EPA evaluated EGU HAP emissions for possible regulation under 42 U.S.C. § 7412, EPA found that those HAP emissions did not pose any significant public health risks. For example, EPA found in 1975 and again in 1987 that "coal-fired power plants ... do not emit mercury in such quantities that they are likely to cause the ambient mercury concentration to exceed" a level needed to "protect the public health with an ample margin of safety." 40 Fed. Reg. 48,292, 48,297, 48,298 (Oct. 14, 1975); 52 Fed. Reg. 8724, 8725 (Mar. 19, 1987) (reaffirming mercury conclusion); see also 48 Fed. Reg. 15,076, 15,085 (Apr. 6, 1983) (EGU radionuclide emissions do not pose a public health hazard).

3. In the 1990 CAA Amendments, Congress concluded that this risk-based approach to HAP regulation was too time-consuming and cumbersome for most categories emitting HAPs. See S. Rep. No. 101-228, at 131-33 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3516-18. To solve this problem, Congress identified 189 HAPs in 42 U.S.C. § 7412(b) and instruct-

ed EPA in 42 U.S.C. § 7412(c) to list categories of "major" stationary sources of these HAPs based on the amounts of HAPs they emit. Such listing then triggered an obligation for EPA to establish "maximum achievable control technology" (MACT) emission standards under 42 U.S.C. § 7412(d), based on the emission reductions achieved in practice by the best controlled similar sources. *Id.* § 7412(d)(3). EPA was also authorized to list and regulate smaller, non-major (*i.e.*, area) sources separately under 42 U.S.C. § 7412(c) and (d) using a less stringent regulatory standard.

Although this new MACT technology-based approach to regulation of HAPs departed from the historic risk-based approach, Congress also retained a "residual risk" component to the § 7412 regulatory program for those source categories subject to MACT. Under 42 U.S.C. § 7412(f)(2)(A), following the establishment of MACT standards, additional emission standards are required where necessary to *protect public health or the environment.* In setting such residual risk standards, the Administrator *must* consider "cost" as well as other factors.[1]

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[1] In preventing "adverse environmental effect[s]," EPA is required to consider "costs, energy, safety, and other relevant factors." 42 U.S.C. § 7412(f)(2)(A); Pet. App. 492a. In addressing residual health risk, the Administrator is to provide an "ample margin of safety," as construed under the 1977 CAA. *Id.* In *Natural Resources Defense Council, Inc.* v. *EPA*, 824 F.2d 1146 (D.C. Cir. 1987), the court interpreted "ample margin of safety" to require consideration of costs.

4. As part of the 1990 CAA Amendments, Congress imposed substantial additional control requirements on EGU emissions of non-hazardous, or "conventional," pollutants.[2] Because implementation of these controls for conventional pollutants (*e.g.*, flue gas desulfurization systems or "scrubbers" for sulfur dioxide emissions and fabric filters or electrostatic precipitators for particulate matter emissions) would also reduce HAP emissions, Congress in 42 U.S.C. § 7412(n)(1)(A) required that EPA treat EGUs differently from every other source category regulated under § 7412.

Largely similar to 42 U.S.C. § 7412(m)(6) (a provision that calls for "necessary and appropriate" regulation of residual "health" *and* "environmental" risks from HAPs deposited in the Great Lakes,[3] § 7412(n)(l)(A) calls for "appropriate and necessary" regulation of any residual public health risks from EGU HAP emissions that remain after regulation under the other emission reduction programs of the

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[2] 42 U.S.C. §§ 7491-7492 (Regional Haze), §§ 7501-7515 (Nonattainment), §§ 7651-7651(*o*) (Acid Rain).

[3] In 42 U.S.C. § 7412(m)(6) (Pet. App. 499a-500a), Congress called for regulation of residual risks associated with HAPs being deposited in the Great Lakes and other waters based on a study and report to Congress, if EPA finds that the "provisions of ... section [7412] are inadequate to prevent serious adverse effects to public health" or "serious ... environmental effects." Upon making such a health or environmental residual risk finding, EPA must "promulgate ... such further emission standards or control measures as may be necessary and appropriate" to protect public health or the environment.

1990 Amendments. Specifically, § 7412(n)(1)(A) directed EPA by 1993 to undertake a study and report to Congress on any "hazards to public health" posed by EGU HAP emissions. Pet. App. 500a. Based on that study (known as the Utility Study), public health hazards that remain "after imposition of the requirements of this [Act]" would be identified for possible regulation. *Id.* As part of that Utility Study, EPA was to "develop and describe ... alternative control strategies for [EGU HAP] emissions which may warrant regulation under this section." *Id.*

Section § 7412(n)(1)(A) contrasts to the other residual risk provisions mentioned above, 42 U.S.C. § 7412(f) and (m)(6), which authorize regulation of residual adverse "public health" and "environmental effects," by calling for regulation of *only* "hazards to public health" that remain after implementation of other EGU emission reduction programs. These residual public health risks from EGU HAP emissions are to be regulated "under this section" – *i.e.*, under 42 U.S.C. § 7412, as opposed to other CAA regulatory programs – and then only if EPA found such regulation is "*appropriate and necessary* after considering the results of the study" that addressed and identified *only* public health risks. 42 U.S.C. § 7412(n)(1)(A) (emphasis added).

5. The universe of EGU HAPs evaluated in EPA's Utility Study[4] was (i) mercury, (ii) non-mercury metal HAPs, (iii) acid gas HAPs (*e.g.*, hydrogen chloride and hydrogen fluoride), and (iv) organic HAPs and dioxin. Consistent with its pre-1990 evaluations of EGU HAP emissions, when EPA completed the Utility Study in 1998, EPA did not identify any "hazards to public health" posed by any HAP emissions that would remain after implementation of other CAA programs. As a result, the Utility Study did not contain any "appropriate and necessary" determination under 42 U.S.C. § 7412(n)(1)(A). Utility Study at ES-1; Pet. App. 636a.

Instead, EPA stated that it "believes that mercury from coal-fired utilities is the HAP of greatest potential concern" and that "[f]urther research and evaluation are needed to gain a better understanding of the risks and impacts of utility mercury emissions." *Id.* at ES-27; Pet. App. 637a. For three trace metals (arsenic, nickel, and chromium), EPA noted "potential concerns and uncertainties that may need further study." *Id.* EGU acid gas emissions were found to be at least an order of magnitude below EPA's health protective thresholds, and the health risks for organic HAPs and dioxin were found to be vanishingly small. *Id.* at 6-3.

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[4] EPA, EPA-453/R-98-004a, Study of Hazardous Air Pollutant Emissions from Electric Utility Steam Generating Units -- Final Report to Congress, Vol. 1 (Feb. 1998), Docket No. EPA-HQ-OAR-2009-0234-3052.

6. On December 20, 2000, well before EPA could complete the data collection and research on mercury it had said in the Utility Study was necessary to make an "appropriate and necessary" determination, then-departing Administrator Browner published a "notice of regulatory finding" without any prior public notice or opportunity to comment. This notice announced her conclusion that regulation of mercury emissions from coal-fired EGUs and nickel emissions from oil-fired EGUs was "appropriate and necessary" under 42 U.S.C. § 7412, and that she was therefore listing EGUs as a source category under 42 U.S.C. § 7412(c). 65 Fed. Reg. 79,825, 79,830 (Dec. 20, 2000); Pet. App. 630a. As EPA explained, this notice of regulatory finding was not a final agency action and would be the subject of future rulemaking. *Id.* at 79,831; Pet. App. 633a-634a.

7. In 2004, EPA began the promised rulemaking under § 7412(n)(1)(A) to address whether it was "appropriate and necessary" to regulate HAP emissions from coal- and oil-fired EGUs under § 7412. On March 29, 2005, EPA issued a final rule in which it found that because "new information demonstrates that the level of Hg [mercury] emissions projected to remain 'after imposition of section [74]10(a)(2)(D) does not cause hazards to public health ... it is not appropriate to regulate coal-fired Utility Units under section [74]12 on the basis of Hg emissions." 70 Fed. Reg. 15,994, 16,004 (Mar. 29, 2005); Pet. App. 591a-592a. EPA similarly concluded that (i) regulation of nickel emissions from oil-fired EGUs was neither "appropriate" nor "necessary," *id.* at 16,007-08; Pet.

App. 604a-608a, and (ii) coal-fired EGU emissions of other non-mercury HAPs were too small to warrant regulation. *Id.* at 16,006-07; Pet. App. 598a-604a.

Having found, after notice-and-comment rulemaking, that Administrator Browner's December 2000 notice of regulatory finding "lacked foundation," and that regulation under 42 U.S.C. § 7412 was not "appropriate and necessary," EPA determined that the predicate for listing EGUs under 42 U.S.C. § 7412(c) was not met. *Id.* at 15,994; Pet. App. 545a. EPA therefore removed EGUs from the list for § 7412 regulation, *id.*, and at the same time promulgated control technology regulations for EGU mercury emissions under CAA § 111, 42 U.S.C. § 7411. 70 Fed. Reg. 28,606 (May 18, 2005). By doing so, EPA ensured that EGU mercury emissions would continue to decrease even below the health protective emission levels that existed in 2005.

8. Numerous parties challenged EPA's 2005 final rule finding § 7412 regulation of EGU HAPs was neither "appropriate" nor "necessary," as well as the accompanying rule setting 42 U.S.C. § 7411 technology-based standards for mercury. On February 8, 2008, the court vacated EPA's decision to remove coal-fired and oil-fired EGUs from the § 7412 list and, having reinstated EPA's earlier § 7412 listing of EGUs, therefore vacated EPA's § 7411 technology-based standards for mercury.[5] *New Jersey* v. *EPA*, 517

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[5] Under the CAA, a source category cannot be simultaneously regulated under § 7411 and § 7412. 42 U.S.C. § 7411(d).

F.3d 574 (D.C. Cir. 2008). The court held that even if listed erroneously for regulation under § 7412, once listed, source categories could only be removed from the 42 U.S.C. § 7412(c) list if the Agency made showings required by 42 U.S.C. § 7412(c)(9) that were not the same (*e.g.*, requiring "environmental" risk findings) as the singular "public health" hazard "appropriate and necessary" standard in § 7412(n)(1)(A). *Id.* at 581-82. Because EPA had not made the 42 U.S.C. § 7412(c)(9) delisting findings, the court found that EPA's § 7412(n) rule finding that § 7412 regulation of EGU HAP emissions was neither "appropriate" nor "necessary," and removing EGUs from the § 7412 list, was not valid. *Id.* at 583.

9. In 2011 and 2012, EPA conducted a remand rulemaking, which resulted in the Final Rule at issue here. 77 Fed. Reg. 9304 (excerpts reproduced at Pet. App. 105a-476a). In that rule, EPA concluded that its 2000 "appropriate and necessary" notice of regulatory finding – a finding that only applied to public health risks from mercury emissions from coal-fired EGUs and nickel emissions from oil-fired EGUs – was valid when made, and constituted a sufficient basis for listing EGUs for regulation under the MACT program. *Id.* at 9320; Pet. App. 179a. As the basis for this reversal of its 2005 rule, EPA cited more recent information that EPA believed established that (i) EGU mercury emissions pose a public health hazard, (ii) other utility metal emissions (arsenic, chromium, and nickel) from a limited number of EGUs pose health risks even though those risks are less than risks that EPA had previously found

were protective of public health "with an ample margin of safety,"[6] and (iii) acid gas EGU HAP emissions pose no public health risk, but rather a potential risk to the environment. *Id.* at 9361-62; Pet. App. 368a-371a; 76 Fed. Reg. 24,976, 25,051 (May 3, 2011) (proposed rule) ("Our case study ... of EGUs did not indicate any significant potential for them to cause any exceedances of the chronic RfC [*i.e.*, health protective concentration] for HCl [hydrogen chloride]...."); Pet. App. 542a-543a.

Based on this record, EPA issued MACT emission standards under 42 U.S.C. § 7412(d) not only for EGU mercury emissions, but also for non-mercury metal and acid gas emissions, and work practice standards for organic substance emissions under 42 U.S.C. § 7412(h). In doing so, EPA rejected comments explaining that only those EGU HAP emissions that create a residual "hazard to public health" after imposition of other CAA programs could be

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[6] For example, EPA found under 42 U.S.C. § 7412(f)(2)(A) that 100-in-one million risk (a risk 20 times greater than the five-in-one million risk EPA estimated for emissions of these three HAPs from the EGU with the greatest risk) provides an ample margin of safety and the D.C. Circuit affirmed that determination. *Natural Res. Def. Council* v. *EPA*, 529 F.3d 1077, 1080, 1082 (D.C. Cir. 2008) (affirming § 7412(f)(2)(A) EPA determination); see also EPA, Supplement to the Non-Hg Case Study Chronic Inhalation Risk Assessment in Support of the Appropriate and Necessary Finding for Coal- and Oil-Fired Electric Generating Units at 12 (Nov. 2011), Docket No. EPA-HQ-OAR-2009-0234-19912 (noting highest EGU risk for non-Hg HAP metal emissions).

regulated under § 7412, and then only to the extent "appropriate and necessary." 77 Fed. Reg. at 9325-26, 9329-30; Pet. App. 205a-208a, 221a-227a.

EPA responded to this argument by construing 42 U.S.C. § 7412(n)(1)(A) as requiring MACT regulation of every HAP emitted by every EGU if EPA finds only one HAP emitted by one or more EGUs creates a residual "public health" risk *or* an "environmental" risk. 77 Fed. Reg. at 9326; Pet. App. 365a; see also 76 Fed. Reg. at 24,988; Pet. App. 523a. Under this new interpretation, 42 U.S.C. § 7412(n)(1)(A) requires regulation of EGU HAP emissions that pose no hazard to public health. Rather, according to EPA, regulation of all EGU HAP emissions is "appropriate and necessary" as long as emissions of a single HAP by a single EGU present a residual public health *or environmental* risk.

10. According to EPA's own analyses, regulation of all EGU HAP emissions from all EGUs would be extraordinarily expensive – about $9.6 billion per year. 77 Fed. Reg. at 9306; Pet. App. 115a. By comparison, EPA found the health benefits of HAP reductions under its program would be extraordinarily low (just $4-6 million, all from reducing mercury). *Id.* at 9428; Pet. App. 461a.[7] Yet EPA found this

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[7] Of the EGU HAPs that it analyzed, EPA found that only mercury reductions resulted in quantifiable health benefits. The $4-6 million estimate represented EPA's calculation of the aggregate public health benefit of avoided loss of IQ points from implementation of the Final Rule. According to EPA, the rule would prevent nationally the loss of a total of 511 IQ points to

gross imbalance of costs and benefits irrelevant under the § 7412(n)(1)(A) "appropriate and necessary" standard, based on its view that the term "appropriate" could be read to preclude any consideration of costs in making regulatory decisions for EGUs. *Id.* at 9327 ("[I]t is reasonable to make the listing decision, including the appropriate determination, without considering costs."); Pet. App. 210a. Thus, for example, even though EPA concluded that acid gas emissions pose no health risk, and even though it could not quantify any environmental risk associated with hydrogen chloride emissions in the United States, EPA imposed stringent requirements that make the acid gas standards the most costly part of the Final Rule[8] because regulation of these environmental risks was "appropriate." 76 Fed. Reg. at 25,016; Pet. App. 533a.

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the most sensitive individuals (i.e., prenatally-exposed children), an increment of two one-thousandths of an IQ point per individual across the subject population. 77 Fed. Reg. at 9428; Pet. App. 461a. No benefit from reducing EGU acid gas and non-mercury metal emissions was quantified.

[8] About half of the costs of the Final Rule are associated with acid gas emissions reduction. UARG, Comments on National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units: Proposed Rule at 258 (Aug. 4, 2011), Docket No. EPA-HQ-OAR-2009-0234-17775 ("UARG Comments"); Pet. App. 512a, and UARG Comments, Attachment 15 at 6. The acid gas standards added about $30 billion in additional capital costs. *Id.* at 258; Pet. App. 512a. See also *id.*, Attachment 15 at 12, 15, and 16.

11. Twenty-four States and numerous industry and labor petitioners challenged the Final Rule before the D.C. Circuit. In that proceeding, a principal argument of State, industry, and labor petitioners (including UARG) was that EPA had impermissibly interpreted 42 U.S.C. § 7412(n)(1)(A) to narrow the "appropriate and necessary" decisional standard to preclude consideration of "cost" as a relevant factor while, at the same time, expanding the scope of regulation to include pollutants that pose only residual "environmental risks" and no "public health" risks.

12. The court below issued its opinion on April 15, 2014, denying (and, in one case, dismissing) all petitions for review. In rejecting petitioners' arguments, the panel held that EPA permissibly construed § 7412(n)(1)(A) to require regulation of all HAPs emitted by EGUs under 42 U.S.C. § 7412(d) based on a finding that regulation of a single HAP is "appropriate and necessary." Pet. App. 41a. Moreover, the court endorsed EPA's decision to regulate EGU HAP emissions regardless of the cost of such regulation. *Id.* at 24a-36a. Judge Kavanaugh dissented in part, on the grounds that it was both impermissible and unreasonable for EPA to determine that regulation of EGU HAP emissions was "appropriate" without considering the cost of regulation. *Id.* at 78a. The "key statutory term . . . 'appropriate,'" Judge Kavanaugh reasoned, is "the classic broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors, health and safety benefits on the one hand and costs on the other." *Id.* at 88a.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to address an issue of significance to the administration of the CAA and similar regulatory statutes: whether a broad decisional standard like "appropriate and necessary" can be read simultaneously (i) to exclude an otherwise relevant factor simply because Congress specifically addressed that factor in other, more narrowly drawn decisional standards in the same statute, and (ii) to expand regulation beyond the targeted pollution at issue (*i.e.*, residual "public health" risks) by adding a new criterion for regulation (*i.e.*, "environmental" risk).

Under the panel majority's reasoning, because a broad decisional standard (*e.g.*, to regulate as "appropriate and necessary," or to set rates that are "just and reasonable," or to take action based on "public interest and necessity") does not explicitly list decisional criteria, an agency is free to pick and choose, without qualification, the criteria it applies in making regulatory decisions under that standard. Under this decision, even though broad public interest standards are "commonly" used to ensure consideration of a wide range of factors – all of the costs and benefits of the targeted regulatory action – an agency can choose any one of those factors as the basis for its decision while ignoring others.

EPA's regulation of "acid gases," the most costly element of the Final Rule, illustrates how far EPA has been permitted to depart from the statute and how far the court below went to justify that depar-

ture. Section 7412(n)(1)(A) only authorizes EPA to regulate EGU HAPs under § 7412 that present residual "hazards to public health," and then only as "appropriate and necessary." Because EPA could not find *any* residual public health risk associated with EGU acid gas emissions, it interpreted the term "appropriate" to override the "public health" hazard limits in that provision and to authorize regulation of "environmental" effects such as acid deposition. See 76 Fed. Reg. at 25,016; Pet. App. 533a.[9] And because under its companion interpretation of "appropriate" it was precluded from considering costs, EPA reasoned, it could impose on EGUs under § 7412 a requirement to install "scrubbers" and other sulfur dioxide control devices at a capital cost of about $30 billion – all to address an environmental effect ("acid deposition") that Congress had already addressed at length in Title IV of the CAA based on Congress' own balancing of costs and benefits.

Considered as a whole, the Final Rule is the most costly rule ever issued by EPA. It imposes costs on the utility industry of over $9 billion annually. 77 Fed. Reg. at 9306; Pet. App. 115a. It will contribute

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[9] Compare 42 U.S.C. § 7412(m)(6); Pet. App. 499a-500a (identifying residual "serious adverse ... public health" effects and "serious or widespread environmental effects" in a "report" and regulating them by applying a "necessary and appropriate" decisional standard) with § 7412(n)(1)(A); Pet. App. 500a (identifying residual "hazards to public health" in a "study" and regulating them by applying an "appropriate and necessary" decisional standard). See also *supra* note 3 and accompanying text.

to the retirement by 2016 of an estimated 1/6 of coal capacity in the country (54 gigawatts out of total capacity of about 300 gigawatts). U.S. Energy Information Administration, Today in Energy, AEO2014 Projects More Coal-Fired Power Plant Retirements by 2016 Than Have Been Scheduled (Feb. 14, 2014), *available at* http://www.eia.gov/todayinenergy/detail.cfm?id=15031 ("EIA Report"). The costs and other impacts of this rule will ripple through the economy. UARG Comments, *supra* note 8, at 257-59; Pet. App. 511a-513a.

This Court should grant certiorari to address the panel's decision given its enormous economic and social impacts as well as the importance of the panel's decision to the proper administration of the CAA and other regulatory statutes with broad decisional standards.

I. Certiorari Is Needed to Address Whether a Broad Statutory Standard Governing Regulation of a Specific Subject Matter Gives an Agency Authority to Ignore Factors Like Cost and to Expand Regulation to Cover Additional Regulatory Subjects.

EPA's interpretation of the § 7412 "appropriate and necessary" standard fundamentally changed in 2011 when EPA proposed the Final Rule at issue here. In 2005, EPA interpreted this decisional standard as encompassing consideration of costs in determining whether to regulate only those specific EGU HAP emissions that pose residual "hazards to public health," after consideration of emission reduc-

tions under other CAA programs. According to EPA, "[n]othing precludes EPA from considering costs in assessing whether regulation of Utility Units under section [74]12 is appropriate in light of all the facts and circumstances presented." 70 Fed. Reg. at 16,001 n.19; Pet. App. 576a (citing *Michigan* v. *EPA*, 213 F.3d 663 (D.C. Cir. 2000) (per curiam)).[10]

Distinguishing this Court's decision in *Whitman* v. *American Trucking Assn's*, 531 U.S. 457 (2001), EPA observed that "the modest words 'adequate margin' and 'requisite' in" 42 U.S.C. § 7409(b)(1) did "not 'leave room' [for EPA] to consider cost" in establishing CAA national ambient air quality standards. 70 Fed. Reg. at 16,001 n.19 (quoting 531 U.S. at 466); Pet. App. 576a. By contrast, the "appropriate and necessary" language in 42 U.S.C. § 7412(n)(1)(A) is not "modest" in scope. Rather, these are "broad terms" that "leave room for consideration of costs in deciding whether to regulate" under 42 U.S.C. § 7412 specific EGU HAP emissions still posing health hazards, after implementation of EGU controls under other provisions of the CAA. *Id.*

Six years later, a different EPA in a different Administration embraced exactly the opposite conclusion: "We ... interpret the term 'appropriate' to not allow for the consideration of costs...." 76 Fed.

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[10] In *Michigan*, the D.C. Circuit had found that "only where there is 'clear congressional intent to preclude consideration of cost' that we find agencies barred from considering costs." 213 F.3d at 678 (citations omitted).

Reg. at 24,988; Pet. App. 523a. Costs were not relevant under the "appropriate and necessary" decisional standard, EPA reasoned, due to the lack of "an express statutory requirement that the Agency consider costs in making the appropriate determination." 77 Fed. Reg. at 9327 (emphasis added); Pet. App. 210a.

In support of the conclusion that consideration of costs is "not allow[ed]" under the "appropriate" standard, EPA cited other provisions of § 7412 with narrow statutory standards that explicitly preclude consideration of costs. For example, decisions to regulate non-EGU source categories under § 7412 are based exclusively on numerical tonnage thresholds, making cost irrelevant. 42 U.S.C. § 7412(a)(1), (c). For source categories regulated under § 7412(d), a "MACT floor" must be established based exclusively on the "best performing 12 percent" of similar units in the source category. Again, only performance, not cost, is relevant. 42 U.S.C. § 7412(d)(3)(A). According to EPA, these provisions are evidence that Congress intended that cost not be considered under the very different "appropriate and necessary" regulatory standard of § 7412(n)(1)(A). Final Br. for Resp't at 53-54, *White Stallion Energy Ctr., LLC* v. *EPA*, 748 F.3d 1222 (D.C. Cir. 2014) (No. 12-1100). In other words, according to EPA, a regulatory decision based on narrow criteria in one provision evidences a congressional intent to limit the factors normally relevant under a broad decisional standard found elsewhere in the statute.

On review, the court below affirmed EPA's new, cost-blind interpretation of the § 7412(n)(1)(A) decisional standard. Conceding that "the term 'appropriate' is 'open-ended,' 'ambiguous,' and 'inherently context-dependent,'" Pet. App. 26a (quoting *Sossamon* v. *Texas*, 131 S. Ct. 1651, 1659 (2011)), the panel nevertheless refused to give effect to this "open-ended" embrace of a broad range of relevant factors because "[o]n its face, § [74]12(n)(1)(A) neither requires EPA to consider costs nor prohibits EPA from doing so." *Id.*

According to the panel majority, "[t]hroughout § [74]12, Congress mentioned costs explicitly where it intended EPA to consider them." *Id.* In all, the panel majority identified six provisions in 42 U.S.C. § 7412 where the word "cost" or "costs" appeared (*i.e.*, 42 U.S.C. § 7412(d)(2), (d)(8)(A)(i), (n)(1)(B), and (s)(2); Pet. App. 484a-485a, 488a, 500a-501a, and 502a), or for which the D.C. Circuit had found costs relevant (*i.e.*, 42 U.S.C. § 7412(f)(1)(B) and (f)(2)(A); Pet. App. 491a and 492a). Pet. App. 26a-27a. Because Congress in these other provisions explicitly provided that EPA is to take "cost" into account, the panel majority reasoned, Congress could not "by using only the broad term 'appropriate' ... have intended ... that costs be considered ... in § [74]12(n)(1)(A)." *Id.* at 27a.

But as Judge Kavanaugh explained, the "broad term 'appropriate'" normally communicates Congress's expectation that costs will be taken into consideration. Indeed, as this Court has observed, Con-

gress's use of "broad language" in the CAA does not itself communicate "'ambiguity,'" see *Massachusetts* v. *EPA*, 549 U.S. 497, 532 (2007), so much as it "'demonstrates breadth.'" *Id.* (quoting *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212 (1998)); cf. *Sossamon*, 131 S. Ct. at 1667 (While "[t]he majority contends that the use of a 'context-dependent' word like 'appropriate' necessarily renders the provision ambiguous[,] ... the fact that the precise relief afforded by a court may vary depending on the particular injury to be addressed in a given case does not render [the statutory provision] ambiguous; it simply means that Congress meant for that provision to be comprehensive.") (Sotomayor, J., dissenting)). The panel acted in a manner contrary to these established principles of statutory construction in accepting EPA's decision that the "appropriate and necessary" decisional standard does "not allow[ ]" any consideration of costs.

The negative implications of EPA's approach to broad decisional standards are magnified by EPA's use of the "appropriateness" standard to justify regulation of acid gases on the basis of environmental harms, which the panel also affirmed. Pet. App. 36a-37a. Section 7412(n)(1)(A) limits regulation of EGU HAPs to that which is "appropriate and necessary" after considering a report that is *only to identify residual "hazards to public health."* According to EPA, because "appropriate" is a broad term that can include "environmental impacts," it is "appropriate" to regulate acid gases in the absence of any public health hazard, and despite billions of dollars of costs,

because acid gas emissions can contribute to acid deposition. 77 Fed. Reg. at 9310; Pet. App. 138a. See *supra* note 8 and accompanying text.

Based on this reasoning, EPA required the electric utility industry to retrofit flue gas desulfurization systems to limit an environmental effect that Congress wrote an entire title in the CAA (*i.e.*, Title IV) to address. Title IV was based on Congress's own careful balancing of costs and benefits. Remarkably, EPA would second-guess Congress' decision on how to regulate acid deposition without even weighing the costs and benefits of that action, because it interprets the broad "appropriate and necessary" decisional standard as a congressional delegation to regulate acid deposition without any consideration of costs!

As this Court recently observed, "[w]e expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." *Utility Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2444 (2014) (internal quotation marks omitted). Here, the Agency claims authority to impose unbridled costs on a critical industry, to address a matter extensively addressed by Congress under another Title of the statute, claiming that this is what Congress meant as "appropriate." Especially in this context, interpreting the term "appropriate" to impose costly regulation to achieve a regulatory end that Congress did not sanction (*i.e.*, regulation of adverse environmental effects under 42 U.S.C. § 7412(n)(1)(A)) is a reach too far.

More broadly, if EPA's reasoning were accepted, then any administrative agency responsible for administering a broad regulatory decisional standard could write its own decisional criteria to govern a regulatory program and to expand that program beyond the congressional delegation. For example, if a statute were to authorize only "such regulation of interstate drug sales as is in the public interest," the reasoning below would allow the agency to expand regulation to include drug manufacturing standards (because the agency believed such regulation would be in the "public interest") and then to ignore factors such as the health benefits of a drug and the cost of regulation in controlling its manufacture and sale. Numerous federal statutes contain similar broad decisional standards that are candidates for such executive branch lawmaking.[11]

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[11] See, *e.g.*, 47 U.S.C. § 303 ("the [Federal Communications] Commission from time to time, as public convenience, interest, or necessity requires, shall" exercise with respect to various enumerated regulatory powers); 29 U.S.C. § 1347 ("the [Pension Benefit Guaranty Corporation] is authorized in any such case in which the corporation determines such action to be appropriate and consistent with its duties under this subchapter, to take such action as may be necessary...."); 29 U.S.C. § 652(8) (an "'occupational safety and health standard'" promulgated by the Secretary of Labor is "a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.").

"Under our system of government, Congress makes laws and the President, acting at times through agencies like EPA, 'faithfully execute[s]' them." *Utility Air Regulatory Grp.*, 134 S. Ct. at 2446. While the power of executing the laws "necessarily includes both authority and responsibility to resolve some questions left open by Congress ... it does not include a power to revise clear statutory terms...." *Id.* Congressional direction to EPA to regulate a residual "public health hazard" from specific EGU HAP emissions as "appropriate and necessary" is not a delegation to an agency to create its own program for regulating the environmental effects of acid deposition, much less to define its own decisional criteria. It is not a direction to ignore factors commonly encompassed in a broad term such as "appropriate." To conclude otherwise would allow EPA to "transform[ ] ... regulatory authority without clear congressional authorization." *Id.* at 2444.

Certiorari should be granted to address the panel's conclusion that a broad statutory standard should be read as a delegation of authority to the Agency to craft its own decisional standards, both (i) picking and choosing from among the broad range of factors encompassed by such standards and (ii) using that language to expand regulation beyond the regulatory target identified by Congress (*i.e.*, beyond residual "public health" risks in this case). Because the D.C. Circuit has exclusive jurisdiction to review numerous agency decisions made under broad decisional standards, granting certiorari is especially important here.

II. Certiorari Is Needed to Address Whether an Agency That Has Authority to Consider Costs May, Consistent With Its Responsibility to Engage in Reasoned Decisionmaking, Choose to Disregard Costs.

As a back-stop justification for its cost-blind reading of the statute, EPA argued that even if it could permissibly consider costs under the "appropriate and necessary" standard, interpreting this phrase to preclude cost considerations was "reasonable." 77 Fed. Reg. at 9327 ("[I]t is reasonable to make ... the appropriate determination, without considering costs."); Pet. App. 210a. While the panel majority seemed to accept EPA's cost-blind interpretation as a matter of *Chevron* Step One, see, *e.g.*, Pet. App. 27a (Congress could not "by using only the broad term 'appropriate' ... have intended ... that costs be considered ... in § [74]12(n)(1)(A)."), 26a (While "the word 'appropriate' might require cost consideration in *some* contexts, such a reading ... is unwarranted here.") (emphasis in original), it also held that EPA's interpretation of "appropriate" to preclude consideration of costs was "clearly permissible" because the term is "ambiguous." *Id.* at 28a.

In response, Judge Kavanaugh explained that "consideration of cost is commonly understood to be a central component of ordinary regulatory analysis, particularly in the context of health, safety, and environmental regulation." *Id.* at 78a. Because "Congress legislated against the backdrop of that common understanding when it enacted" 42 U.S.C.

§ 7412(n)(1)(A) in 1990, *id.*, "as a matter of common sense, common parlance, and common practice, determining whether it is 'appropriate' to regulate *requires* consideration of costs." *Id.* (emphasis added).

Even if consideration of cost is not compelled, Judge Kavanaugh continued, the "centrality of cost consideration to proper regulatory decisionmaking" necessarily establishes "cost" as being among the "relevant factors" that a regulatory agency must normally take into account, a conclusion underscored by the fact that "'every real choice requires a decisionmaker to weigh advantages against disadvantages, and disadvantages can be seen in terms of (often quantifiable) costs.'" *Id.* at 78a, 79a (quoting *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208, 232 (2009) (opinion of Breyer, J.)). See also *id.* at 78a-79a ("In order 'better to achieve regulatory goals – for example, to allocate resources so that they save more lives or produce a cleaner environment – regulators must often take account of all of a proposed regulation's adverse effects....'") (quoting *Whitman*, 531 U.S. at 490 (Breyer, J. concurring)).

As a result, Judge Kavanaugh concluded:

> [W]hether one calls it an impermissible interpretation ... at *Chevron* step one, or an unreasonable interpretation ... at *Chevron* step two, or an unreasonable exercise of agency discretion under *State Farm*, the key point is the same: It is entirely unreasonable for EPA to exclude consideration of costs in determining

> whether it is "appropriate" to regulate electric utilities under the MACT program.

Pet. App. 78a (citing *Motor Vehicle Manufacturers Ass'n* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42-43 (1983)).

As Judge Kavanaugh's dissent makes clear, this case presents the Court with an opportunity to address a related issue of critical importance that the Court has never squarely faced, much less resolved. Namely, if an agency is not expressly *precluded* by Congress from taking costs into consideration in adopting rules to implement a regulatory statute, how far does the agency's discretion extend *not* to take costs into consideration in adopting those rules, given the agency's fundamental obligation, as explained in *State Farm*, to engage in reasoned decisionmaking? This may very well be the first time that a regulatory agency, after conceding that Congress may not have expressly prohibited it from taking costs into account in the adoption of legislative rules, has nevertheless chosen itself to interpret the statute as precluding it from considering costs that run into the billions of dollars annually.

As to this, Judge Kavanaugh acknowledged that it was "certainly true, as the majority opinion states, that the word 'appropriate' is ambiguous in isolation." Pet. App. 77a. And, as he further acknowledged, EPA's interpretation would have to be affirmed under *Chevron* Step Two if "the agency's interpretation of the ambiguity" were "reasonable." *Id.* Here, however, EPA's interpretation was "entirely

unreasonable" not only as a matter of statutory construction, but as a fundamental matter of administrative law. *Id.* at 78a (emphasis added).

In this regard, it is a fundamental principle of administrative law that "an agency *must consider the relevant factors* when exercising its discretion under the governing statute." *Id.* (citing *State Farm*, 463 U.S. at 42-43) (emphasis added). In *State Farm*, this Court made clear that, while an agency decision would be upheld on review provided that, among other things, the agency had taken into "consideration ... the relevant factors," the agency's decisionmaking would be found unreasonable where the agency had "relied on factors which Congress has not intended it to consider" or where the agency had "entirely *failed to consider* an important aspect of the problem." *State Farm*, 463 U.S. at 42-43 (emphasis added).

The "consideration of costs," Judge Kavanaugh pointed out, is a "central and well-established part of the regulatory decisionmaking process." Pet. App. 82a. In other words, "cost" is a "relevant factor" – *i.e.*, an "important aspect of the problem" – as even EPA appeared to recognize here.[12] Thus, EPA abused its discretion under *Chevron* Step Two by in-

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[12] See EPA, EPA's Responses to Public Comments on EPA's *National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units*, Vol. 1 at 29 (Dec. 2011), Doc. No. EPA-HQ-OAR-2009-0234-20126 ("EPA could have interpreted the term 'appropriate' to allow for the consideration of costs...."); Pet. App. 509a.

terpreting the term "appropriate" in 42 U.S.C. § 7412(n)(1)(A) as "not allow[ing] for the consideration of costs." *See* 76 Fed. Reg. at 24,988; Pet. App. 523a.

To be sure, as Judge Kavanaugh noted, "Congress may itself weigh the costs of a particular kind of regulation" (as it did for acid deposition in Title IV of the CAA), "or otherwise take costs out of the equation, when assigning authority to executive and independent agencies to regulate a particular industry or in a particular area." Pet. App. 82a (citing *Whitman*, 531 U.S. 457). That is, Congress may, as a matter of *Chevron* Step One, unambiguously express its intent that costs *not* be considered in an agency's implementation of a particular provision of a regulatory statute, thereby precluding costs from being a "relevant factor" that the agency must take into account. Cf. *Whitman*, 531 U.S. at 471 (The "text of [42 U.S.C. § 7409(b)], interpreted in its statutory and historical context and with appreciation for its importance to the CAA as a whole, unambiguously bars cost considerations from the NAAQS-setting process.").

But as Judge Kavanaugh explained, this case is nothing like *Whitman*. "The statutory provision at issue in Whitman," he noted, "differs significantly from the statute at issue here." Pet. App. 88a. "The statutory provision in *Whitman* tied regulation solely to 'public health,'" which Judge Kavanaugh understood as "typically a critical factor *on the other side of the balance* from costs, not a factor that includes costs." *Id.* (emphasis in original). "Here, by con-

trast," he pointed out, "the key statutory term is 'appropriate' – the classic broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors, health and safety benefits on the one hand and costs on the other." *Id.*

This Court should grant certiorari to address an issue that has profound and far-reaching implications for numerous regulatory statutes: If a statute does not, as a *Chevron* Step One matter, expressly *preclude* consideration of costs in implementing an expansive program with critical impacts on American industry, does the agency's fundamental obligation to engage in reasoned decisionmaking *require* consideration of costs? That the Final Rule is one of the most costly, if not *the* most costly, environmental regulations ever imposed on American industry, and that EPA has imposed these regulatory requirements only after turning a blind eye to those costs, makes this case a compelling one for consideration of this issue.

III. The Issue Here Is of Great National Importance.

Twenty-four States petitioned for review of the Final Rule before the D.C. Circuit, emphasizing the national, economic implications of the rule not only for industry but also for States. The petitioners' concern is well-founded. By EPA's own estimation, the Final Rule will impose annual costs of over $9 billion. 77 Fed. Reg. at 9306; Pet. App. 115a.

EPA nevertheless brushed aside the severity of the impacts of the rule on plant retirement, electric reliability, job loss, and power consumers. *Id.* at 9407-08, 9413-14; Pet. App. 384a-385a, 411a-416a. With little consideration, EPA disregarded detailed studies that explained the pervasive effects of the rule. *Id.* at 9413 ("The EPA disagrees with the estimates presented by the commenters."); Pet. App. 412a. The concerns presented in those studies were valid and EPA's refusal to consider them caused the Agency to grossly underestimate impacts, as subsequent events have shown.

For example, in the Final Rule, EPA projected that coal-fired EGU retirements would be 4.7 gigawatts, boasting that its estimate was "much fewer than some have predicted." *Id.* at 9407; Pet. App. 385a. Yet, the U.S. Energy Information Administration now estimates that the Final Rule will contribute to the retirement by 2016 of an estimated 54 gigawatts of coal-fired electric generating capacity, more than an order of magnitude higher than EPA's prediction. EIA Report, *supra* p. 20. Reliable and affordable electricity is of paramount importance to the maintenance of the public health and welfare, and widespread retirement threatens the public health. *See Union Electric Co.* v. *EPA*, 427 U.S. 246, 272 (1976) (Powell, J., concurring) ("[T]he shutdown of an urban area's electrical service could have an even more serious impact on the health of the public than that created by a decline in ambient air quality.").

As this Court recently explained in reviewing another EPA action under the CAA, "[w]e expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Utility Air Regulatory Grp.*, 134 S. Ct. at 2444 (quoting *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)). Congress spoke clearly in § 7412(n)(1)(A). It did *not* assign authority to EPA to act without consideration of costs. Rather, Congress instructed EPA to conduct a broad decisional analysis that must include consideration of the impacts of its action. Even if one assumes for purposes of argument (as EPA contends) that "appropriate and necessary" is ambiguous, that would still mean that, under *Brown & Williamson*, EPA's cost-blind interpretation is unreasonable and therefore unlawful.[13]

It is critically important that this Court address EPA's contortion of broad statutory decisional standards to transform the CAA into an expansive and cost-blind tool to restructure an essential industry. Without the Court's intervention, EPA will continue to view broad CAA standards as an unfettered delegation to fashion its own decisional standards. For example, in a pending rulemaking, EPA proposes to establish "standards of performance" for CO_2 emissions from existing fossil-fuel-fired EGUs based on

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[13] As with the Final Rule at issue here, in *Utility Air Regulatory Group* v. *EPA*, the economic impacts presented by EPA's unauthorized interpretation of the statute also totaled billions of dollars. 134 S. Ct. at 2442-43.

"building blocks" that have nothing to do with the "performance" of an individual EGU. According to EPA, "standards of performance" can encompass requirements to shift generation to less "carbon-intensive" EGUs (*i.e.*, non-coal-fired EGUs) through environmentally-based dispatch of electricity; to construct and to expand low- or zero-carbon generating units (*i.e.*, solar and wind generation); and to reduce electricity demand. 79 Fed. Reg. 34,830, 34,836 (June 18, 2014). According to EPA, this sweeping proposal will result in the retirement of another 46-49 gigawatts of coal-fired capacity (as well as 16 gigawatts of oil/gas steam capacity) by 2020, *id.* at 34,933, and impose another $5.5 to $7.5 billion in annual compliance costs on the electric utility industry by 2020, *id.* at 34,839, on top of the enormous costs already imposed by the Final Rule at issue here.

These efforts to restructure a basic industry that provides an essential public service are being undertaken by interpreting broad decisional standards to allow the agency to select (or to ignore) specific criteria for regulation. This context emphasizes the vital importance of granting certiorari here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

F. WILLIAM BROWNELL
(Counsel of Record)
HENRY V. NICKEL
LEE B. ZEUGIN
LAUREN E. FREEMAN
ELIZABETH L. HORNER
HUNTON & WILLIAMS LLP
2200 Pennsylvania Ave., NW
Washington, D.C. 20037
(202) 955-1500
bbrownell@hunton.com

Counsel for Petitioner

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